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Angeles Jimenez Garcia-Carriazo

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**CONSERVATION OF THE MARINE  
ENVIRONMENT AND EXPLOITATION  
OF THE SEABED**

**CONSERVATION DE L'ENVIRONNEMENT  
MARIN ET EXPLOITATION  
DES FONDS MARINS**



# CHAPTER 15

## THE PROTECTION OF THE COLLECTIVE INTERESTS AS A TOOL TO CHALLENGE THE OUTER LIMITS OF THE CONTINENTAL SHELF

**Ángeles JIMÉNEZ GARCÍA-CARRIAZO**

*Ph.D. in Law, The Nippon Foundation Lecturer on International Maritime Law  
IMO International Maritime Law Institute, Malta*

**RÉSUMÉ:** *L'extension du plateau continental au-delà de 200 milles marins non conforme aux dispositions pertinentes de la Convention des Nations Unies sur le droit de la mer du 10 décembre 1982 (CNUDM) peut donner lieu à un différend. Des États tiers pourraient se plaindre de l'appropriation illégitime d'une partie de la zone internationale des fonds marins, qui restreint la portée spatiale d'une zone commune.*

*La Convention des Nations Unies sur le droit de la mer ne prévoit pas de mécanisme de contrôle juridictionnel pour les recommandations de la Commission des limites du plateau continental. Le même problème se pose avec les délimitations exagérées ne respectant pas les exigences procédurales de l'article 76. Cela soulève la question de savoir si un organe juridictionnel compétent hypothétique pourrait appliquer un mécanisme de règlement des différends ouvert à des États tiers afin de protéger leurs intérêts collectifs.*

**Mots-clés:** *plateau continental; zone; statut juridique; actio popularis.*

**ABSTRACT:** *The extension of the continental shelf beyond 200 nautical miles not complying with the relevant provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 (UNCLOS) may result in a dispute. Third States might complain about the illegitimate appropriation of a portion of the international seabed area which narrows the spatial scope of a common area.*

*UNCLOS does not foresee a judicial review mechanism for the recommendations from the Commission on the Limits of the Continental Shelf (CLCS). The same problem applies to exaggerated delineations disregarding the procedural requirements of Article 76. This brings into question whether a hypothetical competent jurisdictional body may deal with a dispute settlement mechanism open to third States legal action in order to protect collective interests.*

**Keywords:** *continental shelf; area; legal standing; actio popularis.*

## 1. INTRODUCTION

The extension of the continental shelf beyond 200 nautical miles is carried on at the expense of the international seabed area (the Area). The natural resources located in the latter<sup>1</sup> become subject to the sovereign rights of the coastal State for the purposes of exploration and exploitation.

The coastal State is the only responsible for drawing the outer limits of the continental shelf on the basis of the recommendations issued by the CLCS and no competence is given to any other party thereon. Challenging the outer limits drawn by a coastal State is not foreseen in UNCLOS, which only predicts two alternatives: making a revised or a new submission to the CLCS.

The delineation of the limits of the continental shelf has not been expressly excluded from the dispute settlement mechanism provided for in Part XV of UNCLOS. Therefore, we proceed from the fact that a mechanism for reviewing the outer limits is tenable. The questions that arise are who can initiate the proceedings, on which grounds and against whom.

The fault may not lie solely with the offending States but with the CLCS if the recommendations are not in compliance with UNCLOS. By validating inaccurate limits, the interests of the international community are harmed.

UNCLOS negotiators missed the opportunity to create an international entity responsible for initiating proceedings on behalf of the international community. Therefore, we will argue why and how opening the dispute settlement mechanism to third States legal action is a necessary step in order to protect collective interests.

The competence of the States to take legal action to protect the marine space reserved for mankind is a logical step, otherwise collective interests become meaningless. Limiting the scope of the Area by the extension of the continental shelf results in a lower economic potential to be used by the States. On the basis of these insights, States could defend the common interest and act in their own interest at once.

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<sup>1</sup> Especially, polymetallic and manganese nodules.

## 2. COLLECTIVE INTERESTS

Collective interests have always existed as an expression of the global commons and vested interests of the community of States. Their existence is beyond discussion and they are subjected to an international regime. However, and despite the rising awareness, their recognition has not resulted in the recognition of a true right to protection which any State could invoke in the general interest<sup>2</sup>.

The extension of the continental shelf beyond national territorial jurisdiction limits the prevailing community interests<sup>3</sup> in the correct management and preservation of the oceans. There seems to be a need to give judicial protection to regimes, such as the deep seabed regime, which have been created for the benefit of mankind as a whole. One could therefore argue that States which are not directly affected by the outer continental shelf claims of other States may be accorded the right to take public action<sup>4</sup>.

The better expression of collective interests in the Area is to be found in the common heritage of mankind. The concept was introduced in 1967 by Maltese Ambassador Arvid Pardo, who urged to consider the resources of the oceans beyond national jurisdiction as the common heritage of mankind<sup>5</sup>. He envisaged a future where the seabed and the ocean floor would be exploited under international auspices for the benefit of the entirety of mankind<sup>6</sup>.

In this context, the two key questions are: (i) does a third State have *locus standi* to claim before a court or tribunal that its rights under Part XI have been infringed by the establishment by another State of the outer limits of its continental shelf in violation of Article 76? (ii) is there an *actio popularis* which allows third States to take measures against the delineation that harms collective interests?

## 3. LEGAL STANDING

The extension of the continental shelf beyond 200 nautical miles not only affects other neighbour States, but also the outer limits of the Area. The idea outlined

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<sup>2</sup> GOWLAND-DEBBAS, V. (1997), «Judicial Insights into Fundamental Values and Interests of the International Community», in MULLER, A. (1997), *The International Court of Justice*, Nijhoff, 327, 351; BENZING, M. (2006), «Community Interests in the Procedure of International Courts and Tribunals», *The Law & Practice of the International Courts and Tribunals*, 369.

<sup>3</sup> In this contribution, «common interest», «collective interest» and «community interest» will be used interchangeably.

<sup>4</sup> NELSON, L. D. M. (2002), «The Continental Shelf: Interplay of Law and Science», in ANDÃO, N.; MCWHINNEY, E., and WOLFRUM, R. (eds.), (2002), *Judge Shigeru Oda: Liber Amicorum*, The Hague, Kluwer Law International, vol. 2, 1251.

<sup>5</sup> Note Verbale by Arvid Pardo to the Secretary-General, 22nd Sess., Annex, Mem., UN Doc. A/6695: «The seabed and ocean floor are a common heritage of mankind and should be used and exploited for peaceful purposes and for the exclusive benefit of mankind as a whole».

<sup>6</sup> BUTTIGIEG, J. (2012), «The Common Heritage of Mankind. From the Law of the Sea to the Human Genome and Cyberspace», *SymMel*, vol. 8 (Special Issue).

does throw up a number of questions: Does a third State have the right to take legal action challenging another State's outer limits which are not based on the recommendations of the CLCS? Does a third State have a right to institute proceedings in order to protect the resources which form part of the common heritage of mankind? Could a State unable to argue that its rights/claims as neighbour have been infringed bring a case against a particular delineation claiming an unjustified infringement upon the Area?<sup>7</sup>.

Reasonable doubts arise regarding States' competence to take legal action to vindicate international collective interests within the framework of the dispute settlement mechanism provided for in Part XV of UNCLOS.

A great number of academic writings agree that no entity has standing to initiate judicial proceedings against the delineation by a coastal State of the outer limit of its continental shelf<sup>8</sup>. In this sense, Smith and Taft agree that:

«the Conference negotiators opted to create a Commission with recommendatory functions, and to exclude establishment of the outer limit of the continental shelf from compulsory and binding third-party dispute settlement procedures»<sup>9</sup>.

Other observers consider that this position should be overcome since the recognition of the legal standing would reinforce the protection of the collective interest in the Area as long as it can be shown that States' interests have been harmed by exaggerated claims<sup>10</sup>.

There is no explicit granting of the power to submit a dispute related to the delineation of the continental shelf to the dispute settlement mechanism in UNCLOS. The recognition of the legal standing by UNCLOS would have reinforced the protection of the collective interests in the Area. UNCLOS drafters did not give the International Seabed Authority (ISA) any right to participate in the determination of the common boundary between the Area and the outer limit of the continental shelf.

The ISA is just established to administer the resources of the Area, but it lacks effective supervisory mechanisms in terms of compliance monitoring, sanctions or incentives. It cannot take legal action against the outer limits of the continental

<sup>7</sup> NELSON, L. D. M. (2002), *op. cit.*, 1251; INTERNATIONAL LAW ASSOCIATION (ILA) (2006), *Legal Issues of the Outer Continental Shelf*, Toronto Conference, 9.

<sup>8</sup> MATZ-LÜCK, N. (2009), «Planting the flag in Arctic Waters: Russia's claim to the North Pole», *Goettingen J. Intl.*, 235, 254-255; KARAGIANNIS, S. (1994), «Observations sur la Commission des Limites du Plateau Continental», *Espaces et Ressources Maritimes*, vol. 163, 189; BROWN, E. D. (1984), *Sea-Bed Energy and Mineral Resources and the Law of the Sea: the Areas Within National Jurisdiction*, Bath, Graham & Trotman, 15-16.

<sup>9</sup> SMITH, R., and TAFT, G. (2000), «Legal Aspects of the Continental Shelf», in COOK, P., and CARLETON, C., *Continental Shelf Limits: the Scientific and Legal Interface*, Oxford University Press, 17-20.

<sup>10</sup> BUSCH, S. V. (2016), *Establishing Continental Shelf Limits Beyond 200 Nautical Miles by the Coastal State. A Right of Involvement for Other States?*, Brill-Nijhoff, 321; EIRIKSSON, G. (2004), «The Case of Disagreement Between a Coastal State and the Commission on the Limits of the Continental Shelf», in NORDBQUIST, M.; MOORE, J., and HEIDAR, T. (eds.), (2004), *Legal and Scientific Aspects of Continental Shelf Limits*, Martinus Nijhoff, 251, 258.

shelf established by a coastal State<sup>11</sup>. Conceiving an entity which could take legal action against the delineations that are detrimental to its territory and initiate proceedings on behalf of the international community would have been a reasonable measure<sup>12</sup>.

Likewise, it is not for the CLCS to challenge the outer limits before international jurisdiction since this body is not an international organisation which may become a party to an international dispute<sup>13</sup>. With regard to the coastal State receiving the recommendations, a revised or a new submission are the only options in case of divergence<sup>14</sup>.

Third States enjoy an implicit right to expect outer limits established by any other State party to be effected in conformity with Article 76 UNCLOS. These States have a right to initiate legal action against the delineation of the outer limit of the continental shelf that undermines their rights<sup>15</sup>. Consequently, they have legal standing and may have recourse to the dispute settlement mechanisms provided for in Part XV<sup>16</sup>.

A distinction might be made between third States with overlapping rights over the area in dispute, and third States, not directly affected by the extension, which reject the inaccurate delineation of the continental shelf that encroaches the Area. The first group of States has an undeniable right to challenge the outer limits inasmuch as they are claiming a violation of their rights. The right of the second group is more controversial, but tenable to the extent that the establishment of the outer limits of the continental shelf in conformity with Article 76 UNCLOS can be seen as a right corresponding to an obligation *erga omnes*<sup>17</sup>.

Additionally, granting individual States the competence to defend collective interests may fall within Article 48(1)(b) of the Articles on the Responsibility of

<sup>11</sup> NELSON, L. D. M. (2002), *op. cit.*, 1251; ILA (2006), *Legal Issues of the outer continental shelf*, Toronto Conference, *op. cit.*, 9.

<sup>12</sup> LAUTERPACHT, E. (1991), *Aspects of the Administration of International Justice*, Cambridge University Press, 62. The «logical choice» according to Wolfrum. WOLFRUM, R. (2006), «The Role of International Dispute Settlement Institutions in the Delimitation of the Outer Continental Shelf», in LAGONI, R., and VIGNES, D., (2006), *Maritime Delimitation*, Leiden, Boston, Brill-Nijhoff, 28.

Furthermore, the jurisdiction of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea is confined to disputes with respect to activities in the area. It will be beyond its competence to give an advisory opinion on matters relating to the establishment of the limits of the outer continental shelf.

<sup>13</sup> WOLFRUM, R. (2009), «The Delimitation of the Outer Continental Shelf: Procedural Considerations», in *Liber amicorum Jean-Pierre Cot: Le procès international*, Bruylant, 363.

<sup>14</sup> Ultimate responsibility for delimitation lies with the coastal State itself, subject to safeguards against exaggerated claims. United States: President's Transmittal of the UNCLOS and the Agreement relating to the Implementation of Part XI to the US Senate with Commentary, 7 October 1994, ILM 34 (1995), 1393 et seq. 1427.

<sup>15</sup> GROTE STOUTENBURG, J. (2015), *Disappearing Island States in International Law*, Leiden, Boston, Brill-Nijhoff, 107.

<sup>16</sup> WOLFRUM, R. (2011), «Enforcing Community Interest through International Dispute Settlement», in FASTENRATH, U.; GEIGER, R.; KHAN, D.-E.; PAULUS, A.; VON SCHORLEMER, S., and VEDDER, C. (eds.), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma*, Oxford University, Press, 1142.

<sup>17</sup> TREVES, T. (2011), «Judicial Action for the Common Heritage», in HESTERMEYER, H.; MATZ-LÜCK, N.; SEIBERT-FOHR, A., and VÖKENY, S. (2011), *Law of the Sea in Dialogue*, Springer, 127.

States for Internationally Wrongful Acts<sup>18</sup>, according to which the State may invoke the responsibility of another State if the obligation breached is owed to the international community as a whole. This idea shares features with an *actio popularis*.

The concept of obligation *erga omnes* and *actio popularis* are both intended to protect collective interests. Obligations *erga omnes* have a normative character while the *actio popularis* is a judicial instrument. However, from the legal interest (*erga omnes*) to the legal action (*actio popularis*) there is a blurred line<sup>19</sup>.

#### 4. ACTIO POPULARIS

States have not been awarded the taking of a popular action to challenge an excessive extension. However, progressively, there is a more flexible interpretation in the legal opinion. In this sense, Wolfrum states<sup>20</sup>:

«it is not but a logical step the States may take action to protect established interests of the international community otherwise such community interests would be —legally speaking— nothing but empty shells [...]. According to Article 48(1)(b) of the Articles on State Responsibility, the State may invoke the responsibility of another State if the obligation breached is owed to the international community as a whole. If such words are not meaningless this includes the initiation of proceedings for a judicial settlement».

##### 4.1. Actio popularis in case law

The competence to initiate judicial proceedings in order to protect a common interest has been discussed in different fora. Judicial practice of claims by third-parties is rather limited.

In 1923, in its very first case *SS Wimbledon*<sup>21</sup>, the Permanent Court of International Justice allowed for a claim to be brought by Italy and Japan, even if they were not individually injured<sup>22</sup>. The Court concluded that States enjoy freedom of

<sup>18</sup> In 2001, the International Law Commission attempted to codify the concept of State responsibility by adopting the Draft Articles on the Responsibility of States for Internationally Wrongful Acts.

<sup>19</sup> VOEFFRAY, F. (2004), *L'actio popularis ou la défense de l'intérêt collectif devant les juridictions internationales*, Genève, Graduate Institute Publications.

<sup>20</sup> WOLFRUM, R. (2006), *op. cit.*, 30. The ICJ has stated that «the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things», *East Timor (Portugal v. Australia)*, ICJ, Reports 1995, para. 29, and that «the mere fact that rights and obligations *erga omnes* may be at issue in a dispute would not give the Court jurisdiction to entertain that dispute», *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and admissibility, ICJ, 2006, para. 64.

<sup>21</sup> *SS Wimbledon (Great Britain and others v. Germany)*, Judgment of the Permanent Court of International Justice of 17 August 1923, PCIJ Rep Series A, n° 1, 15, 33.

<sup>22</sup> *Ibid.*, 20: «Each of the four Applicant Powers has a clear interest in the execution of the provisions relating to the Kiel Canal, since they all possess fleets and merchant vessels flying their respective flags».

navigation in the Kiel Canal, as «it has been permanently dedicated to the use of the whole world»<sup>23</sup>. The Court opted for a broad standing, involving States which were not directly affected by the breaches in question but nevertheless had a recognized interest in ensuring compliance with the international regime<sup>24</sup>.

Despite this result, the popular action was initially rejected by the International Court of Justice (ICJ). In the *South-West Africa* cases<sup>25</sup>, the ICJ rejected:

«an *actio popularis*, or a right resident in any member of the community to take legal action in vindication of a public interest. But although a right of this kind may be known to certain municipal systems of law, it is not known to international law as it stands at present: nor is the Court able to regard it as imported by the “general principles of law” referred to in Article 38, paragraph 1 (c), of its Statute»<sup>26</sup>.

A few years later, the dissenting opinions in the *Nuclear Tests* cases held that:

«Although [...] the existence of a so-called *actio popularis* is a matter of controversy [...] the question is one that may be considered as capable of rational legal argument and a proper subject of litigation before this Court»<sup>27</sup>.

Notwithstanding these attitudes, the ICJ has progressively recognized the right of non-injured States to invoke responsibility. In the *Questions relating to the Obligations to Prosecute or Extradite*<sup>28</sup> and in the *Whaling in the Antarctic*<sup>29</sup> cases, Belgium and Australia brought their respective claims with regards to a breach of an obligation *erga omnes*.

These judgements provide good grounds for an *actio popularis* application in order to bring claims for the protection of community interests. If any member of the international community is entitled to bring a claim, the likelihood of obtaining a legal response to a particular breach raises<sup>30</sup>.

## 4.2. *Actio popularis* and the extended continental shelf

Regarding the delineation of the outer continental shelf, case law has ruled against the standing to protect collective interests. In the *Delimitation of maritime*

<sup>23</sup> *Ibid.*, 28.

<sup>24</sup> CRAWFORD, J. (2011), «Responsibilities for Breaches of Communitarian Norms», in FASTENRATH, U. *et al.*, *op. cit.*, 228.

<sup>25</sup> *South-West Africa Cases South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, First phase, 1962, ICJ; *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Second phase, 1966, ICJ.

<sup>26</sup> *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Second phase, 1966, ICJ Rep. 6, para. 88.

<sup>27</sup> *Nuclear Tests (Australia v. France)*. Dissenting Opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga and Waldock [1974] ICJ Rep 312, para. 117.

<sup>28</sup> ICJ, *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, judgement of July 20, 2012, ICJ Reports 2012.

<sup>29</sup> ICJ, *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, judgement of March 31, 2014.

<sup>30</sup> BROKS, E. (2014), *Protection of Interests of the International Community in the Law of the State Responsibility*, PhD thesis, Letonia, University of Riga, 118.

areas between Canada and France (*Saint Pierre et Miquelon*) case<sup>31</sup>, the Court of Arbitration declined to address the delimitation of the continental shelf beyond 200 nautical miles. The Court considered that the case concerned both States and the international community as a whole, and that the latter was not represented in the proceedings:

«Any decision by this Court recognizing or rejecting any rights of the Parties over the continental shelf beyond 200 nautical miles would constitute a pronouncement involving a delimitation not “between the parties” but between each one and the international community, represented by organs entrusted with the administration and protection of the international seabed Area (the seabed beyond national jurisdiction) that has been declared to be the common heritage of mankind [...]. This Court is not competent to carry out a delimitation which affects the rights of a Party which is not before it»<sup>32</sup>.

Nevertheless, the arbitral tribunal which ruled on the delimitation dispute between *Barbados and Trinidad and Tobago*<sup>33</sup> did not align with the position of the arbitrators in the *Saint-Pierre et Miquelon* award, and stated that its jurisdiction «includes the delimitation of the maritime boundary in relation to that part of the continental shelf extending beyond 200 nm»<sup>34</sup>. Arbitrators made no reference to the points raised by Barbados regarding the common heritage of mankind. According to Treves<sup>35</sup>, the tribunal felt it unwise and unnecessary to disagree openly with the view underlying *Saint Pierre et Miquelon* decision, that there must be a way to protect the interests of the international community when extensions of the continental shelf are effected beyond the limits permitted by Article 76 UNCLOS.

Bearing the above mentioned in mind, it is clear that limiting the scope of the Area may hamper the proper marine management, and hence a collective interest. The preservation of the common heritage regime could be regarded as an obligation *erga omnes*<sup>36</sup>, which implies the right of any State to bring a judicial claim<sup>37</sup>, or even constitute a ground for an *actio popularis*. Accordingly, the Institut de Droit International stated that<sup>38</sup>:

«In the event of there being a jurisdictional link between a State alleged to have committed a breach of an obligation *erga omnes* and a State to which the obligation

<sup>31</sup> *Delimitation of maritime areas between Canada and France*, Award of 10 June 1992, 31 International Legal Materials 1145.

<sup>32</sup> *Ibid.*, para. 79.

<sup>33</sup> Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them, decision of 11 April 2006.

<sup>34</sup> *Ibid.*, para. 384.

<sup>35</sup> TREVES, T. (2011), *op. cit.*, 126.

<sup>36</sup> At least, according to the Institut de Droit International's definition: «An obligation under a multilateral treaty that a State party to the treaty owes in any given case to all the other States parties to the same treaty, in view of their common values and concern for compliance, so that a breach of that obligation enables all these States to take action». Institut de Droit International, (2005), Resolution Obligations *Erga Omnes* in International Law, Krakow session, 5th Commission, Article 1(b).

<sup>37</sup> NOYES, J. E. (2009), «Judicial and Arbitral Proceedings and the Outer Continental Shelf», *Vanderbilt Journal of Transnational Law*, 42, 1248.

<sup>38</sup> Institut de Droit International, (2005), *op. cit.*, Art. 3.

is owed, the latter State has standing to bring a claim to the International Court of Justice or other international judicial institution in relation to a dispute concerning compliance with that obligation».

Conversely, the equitable sharing of any benefits derived from economic activities in the Area in conformity with Article 140(2) UNCLOS, the impact on the State's rights to conduct scientific research on the Area under Article 143 UNCLOS or to undertake deep seabed mining activities in accordance with Article 153(2) UNCLOS, or the conflict with the claims of other States with adjacent or opposite coasts whose access to the maximum extension of their respective continental shelves is hindered, are grounds containing elements of an *actio popularis*. Based on these grounds, States could defend the common interest while acting in their own interest, but they would still have a definitive legal interest.

## 5. ENFORCEMENT MECHANISM

The obligation to extend the continental shelf in accordance with Article 76 UNCLOS is owed to State parties to the Convention. A tribunal may be requested to pronounce on the interpretation or the application of Article 76 in connection with the outer limits of the continental shelf which have not been established in accordance with the recommendations of the CLCS<sup>39</sup>. Likewise, the ILC Committee asserts the ability of the courts to rule on whether the CLCS has acted within the limits of its jurisdiction<sup>40</sup>:

«A court or tribunal is competent to exercise jurisdiction in a contentious case between two States in which there is a dispute concerning the interpretation or application of the provisions of the Convention relating to the outer limits of the continental shelf by a coastal State, which also involves acts of the CLCS. A court or tribunal is competent to establish whether the Commission has acted within the limits of its competence or not».

The claim of a State with adjacent or opposite coasts against such infringement would not amount to an *actio popularis*<sup>41</sup>.

What is at stake is the possibility of third States, not directly affected, to act on behalf of the international community and file a claim against an unjustified encroachment upon a regime created for the benefit of mankind. International law does not provide for an *actio popularis*, but, ultimately, possibilities exist to protect some community interests by invoking international dispute settlement mechanisms<sup>42</sup>.

<sup>39</sup> DE MARFFY MANTUANO, A. (2003), «La Fixation des Dernières Limites Maritimes: Le rôle de la Commission des Limites du Plateau Continental», in ANDERSON, D.; BASTID-BURDEAU, G.; BEDJAOU, M., and BEER-GABEL, J. (eds.), (2003), *La Mer et son Droit; Mélanges Offerts à Laurent Lucchini et Jean-Pierre Quéneudec*, Paris, Pedone, 413.

<sup>40</sup> ILC (2006), *Legal Issues of the Outer Continental Shelf*, Toronto Conference, *op. cit.*, 27.

<sup>41</sup> WOLFRUM, R. (2011), *op. cit.*, 1142.

<sup>42</sup> WOLFRUM, R. (2011), «Enforcing Community Interests Through International Dispute Settlement: Reality or Utopia?», in FASTENRATH, U., *et al.*, *op. cit.*, 1132.

Articles of the International Law Commission on State Responsibility are carrying the enforcement of mechanisms for community interests one step further<sup>43</sup>:

«Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if: (a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or (b) the obligation breached is owed to the international community as a whole»<sup>44</sup>.

A State may be considered an injured State if it is «specially affected» by the violation of a collective right<sup>45</sup>. The sole requirement for an invocation of State responsibility is an internationally wrongful act, in other words, a State act in non-conformity with an obligation binding upon it at the time of the alleged breach<sup>46</sup>.

In this sense, Nelson considers that<sup>47</sup>

«States Parties which are not directly affected by the outer continental shelf claims of other States parties may be accorded the right to take public action to protect the integrity of the international seabed area».

The ILA states that «States individually have an interest in the exploration for and exploitation of the resources of the Area. In addition, States can exercise certain high seas freedoms in the seabed and subsoil beyond the limits of national jurisdiction»<sup>48</sup>. Accordingly, the legal basis for establishing sufficient interest may be found in UNCLOS rather than employing the concept of obligation *erga omnes* or *actio popularis*<sup>49</sup>.

The ILA continues that «the existence of this interest in the resources of the Area and these high seas freedoms can be considered to give individual States a legal interest in the definition of the outer limits of the continental shelf. A State may consider that these limits have not been established in accordance with the substantive or procedural requirements of article 76. This would constitute a dispute for the purposes of article 279 of the Convention»<sup>50</sup>. Subsequently, an individual legal interest in the Area constitutes sufficient legal interest for a State to be party to a dispute against an excessive claim<sup>51</sup>.

While most arguments presumed that an *actio popularis* to challenge an exaggerated extension of the continental shelf would be excluded under the dispute settlement system under UNCLOS, this traditional view could be reconsidered in the light of a community approach<sup>52</sup>. Article 288 UNCLOS establishes a broad

<sup>43</sup> *Ibid.*, 1144.

<sup>44</sup> Art. 48 (1) Articles of the International Law Commission on State Responsibility.

<sup>45</sup> Art. 42 (b)(1) Articles of the International Law Commission on State Responsibility.

<sup>46</sup> Art. 12 and 13 Articles of the International Law Commission on State Responsibility.

<sup>47</sup> NELSON, L. D. M. (2002), *op. cit.*, 1252.

<sup>48</sup> ILA (2006), *Legal Issues of the Outer Continental Shelf*, Toronto Conference, *op. cit.*, 26.

<sup>49</sup> BUSCH, S. V. (2016), *op. cit.*, 213.

<sup>50</sup> ILA (2006), *Legal Issues of the Outer Continental Shelf*, Toronto Conference, *op. cit.*, 26.

<sup>51</sup> BUSCH, S. V. (2016), *op. cit.*, 213.

<sup>52</sup> WOLFRUM, R. (2011), *op. cit.*, 1144.

jurisdiction «over any dispute concerning the interpretation and application of this Convention». The sole requirement is a disagreement on the interpretation or application of UNCLOS, no explicit reference is made to the defence of an individual interests.

According to Wolfrum, requiring evidence of prior interest is no longer tenable, at least not in the context of UNCLOS<sup>53</sup>:

«An interpretation of Article 288 UNCLOS allowing a case to be filed without the necessity to prove that individual interests of the applicant State are at stake would be in line with a literal interpretation as well as with the general community orientation of the Convention».

## 6. CONCLUSIONS

The situation we have analysed stems from dispute arising out of a claim that a State has proclaimed a continental shelf extending beyond 200 nautical miles not complying with the relevant rules of Article 76 UNCLOS, thus appropriating a portion of the Area, and narrowing the spatial scope of the common heritage regime<sup>54</sup>.

In those cases, States should be entitled to protect established interests of the international community. Even though the protection of the common heritage of mankind seems a promising ground, it might not be successful if it does not count on the socio-political will of the international community. States should be strongly encouraged to submit to international courts and tribunals claims for the protection of their *erga omnes* rights based on rules protecting the interest of mankind and in overcoming the obstacles which may hamper a decision in favour of such submission<sup>55</sup>. The Articles on the Responsibility of States for Internationally Wrongful Acts point into that direction.

States defending the scope of the Area in the interest of the international community may also act in their own interest. This aspect should ameliorate the concerns of those who hesitate to open the international dispute settlement system to what is considered the equivalent of an *actio popularis*<sup>56</sup>.

Perhaps we are not yet ready for the recognition of the *actio popularis* by international jurisdiction, but it is an idea which is getting stronger support in academic environments. Rather than speaking of *actio popularis* we could discuss about the flexibility of the jurisdiction, it is, after all, a matter of terminology. In any case, a particular interest of a legal nature in the Area constitutes sufficient legal interest to bring proceedings on behalf of the international community.

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<sup>53</sup> *Ibid.*, 1145.

<sup>54</sup> TREVES, T. (2011), *op. cit.*, 116.

<sup>55</sup> *Ibid.*, 132-133.

<sup>56</sup> WOLFRUM, R. (2006), *op. cit.*, 30.

